SUPREME COURT, U. S.

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No. 712

In the

Supreme Court of the United States

October Term, 1965

VELSICOL CHEMICAL CORPORATION, a corporation,
Petitioner,

v.

GOLDEN GATE HOP RANCH, INC., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

WILLIAM A. HELLSELL,
1610 Washington Building
Seattle, Washington 98101
Attorney for Petitioner

Of Counsel:

HELSELL, PAUL, FETTERMAN, TODD
& HOKANSON
1610 Washington Building
Seattle, Washington 98101

THE ARGUS PRESS SEATTLE, WASHINGTON

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In the

Supreme Court of the United States

VELSICOL CHEMICAL CORPORATION, corporation, v. GOLDEN GATE HOP RANCH, INC., a corporation,	No.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner prays that write of certiorari issue directed to the Supreme Court of the State of Washington to review the opinion and judgment of said court entered in the above entitled cause on June 17, 1965.

CITATIONS TO OPINIONS BELOW

This case was tried in the Superior Court for the State of Washington for Yakima County before a judge and a jury and, therefore, there is no opinion in the trial court. The opinion of the Supreme Court of the State of Washington (Dept. 1) is reported in 66 W.D. 2d 455, 403 P.2d 351. This opinion was modified by order dated July 21, 1965. (Tr. 328) The opinion, as so modified, is attached to this petition (Apppendix A, infra, page 1a).

JURISDICTION

Final judgment of the Supreme Court of the State

of Washington (Dept. 1) was entered June 17, 1965. Petitioner filed timely petition for rehearing (Rules of Supreme Court of Washington, Rule on Appeal 50) which was denied by order dated September 14, 1965 (Apppendix B, infra, page 11a). The jurisdiction of this court is invoked under the provision of 28 U.S.C.A. Sec. 1257(3), 62 Stat. 929.

QUESTIONS PRESENTED

1. Whether delivery of summons and complaint to petitioner's comptroller at its main office and place of business in Chicago, Illinois, was effective to confer *in personam* jurisdiction of petitioner on Washington courts under the provisions of the due process clause of the 14th Amendment of the United States Constitution.

2. Whether, constitutionally, a state may subject a foreign corporation to *in personam* jurisdiction of its courts in a case based solely upon alleged tort where the tortious conduct, if any, was completely outside the territorial limits of the state and the sole basis for such jurisdiction is the fact that the injury occurred within the state.

STATUTES INVOLVED

The statutory provisions involved herein are Washington Laws of 1959, Ch. 131, codified as RCW 4.28.180 and 4.28.185, as follows:

" 4.28.180
Personal service of summons or other process may

be made upon any party outside the state. If upon a citizen or resident of this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of personal service within this state; otherwise it shall have the force and effect of service by publication. The summons upon the party out of the state shall contain the same and be served in like manner as personal summons within the state, except it shall require the party to appear and answer within sixty days after such personal service out of the state."

" 4.28.185

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state;

(b) The commission of a tortious act within this state;

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

(4) Personal service outside the state shall be

valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law."

The question involved is whether the application of the above statute to petitioner is permissible under the due process clause of the 14th Amendment to the United States Constitution.

STATEMENT

This action was instituted by respondent in the Superior Court of the State of Washington for Yakima County to recover for alleged damage to respondent's hop yard claimed to have been caused by an insecticide containing an ingredient known as heptachlor. The basic ingredient of the insecticide, technical heptachlor, was manufactured by petitioner. Technical heptachlor was not, in the form sold, usable as an insecticide but was sold to formulators who mixed it with other ingredients to make a usable insecticide.

A. Factual Background

Petitioner is an Illinois corporation with its principal place of business in Chicago and plants in Marshall, Iowa and Memphis, Tennessee. It produces and sells at

wholesale basic chemicals, including technical heptachlor, which are used in the formulation of pesticides. Its products cannot be used by ultimate consumers without further processing by formulators (St. 9).

Technical heptachlor is a brown, waxy, solid, not usable in this form as an insecticide (St. 2257). It is sold to completely independent formulators who combine it with other ingredients to produce liquids and dusts marketable and usable as insecticides (St. 2252).

The insecticide here involved was formulated in Portland, Oregon, by Miller Products Co., sold by Miller to Crop King Company of Yakima, repackaged by Crop King under its own label and sold to a retailer, Toppenish Hop Growers Supply, by this last concern sold to respondent and by respondent applied to its hop yard at Satus, Washington (St. 2072 to 2087, Ex. 34).

Respondent, a California corporation, is a wholly owned subsidiary of S. S. Steiner, Inc., a New York corporation, an international hop brokerage concern with general offices in New York City.

Respondent says that in the spring of 1956, it observed an infestation of strawberry root weevils in its hop yard and advised S. Stinor Gimbel, a vice president in New York City of the parent company, it wished to apply heptachlor to control this infestation and that Mr. Gimbel says he then wrote to petitioner a letter concerning "Heptachlor tolerance on hops" under date

of April 27, 1956 (Appendix C infra, page 12a) (St. 1656, Ex. 119A). Petitioner's chief entomologist, Mr. Bussart, answered that letter from Chicago by letter of May 4, 1956, to respondent's parent at its New York office. Petitioner's letter appears in full in the Washington Supreme Court opinion (Appendix A infra, page 5a).

Mr. Gimbel says he then telephoned respondent at Yakima authorizing use of heptachlor and respondent says it thereafter made the application of heptachlor with resulting damage to its hop yard. Petitioner's alleged negligence in forwarding to New York this letter written in Chicago on May 4, 1956, forms the sole basis for this action against petitioner.

Petitioner never sold its technical heptachlor to any Washington State purchaser (St. 9, 10, 14). Formulators utilizing petitioner's basic chemical were all located outside Washington (St. 10). Petitioner had no warehouse in that state, it stored no merchandise there and had no salesmen soliciting orders there (St. 10). Its only Washington activity (which was *not* relied upon by the Washington Supreme Court to impose *in personam* jurisdiction on petitioner) was the "missionary work" of a field man who made at most two trips to Washington before respondent put the insecticide on its hop yards. In the absence of any showing that respondent decided to use the pesticide because of the two visits of that field man it was impossible, of course, for

respondent to contend that its cause of action *arose out of that activity*. Accordingly, the condition upon which this court distinguished *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) in *Hanson v. Denckla*, 357 U.S. 235 (1958) did not exist. No basis for asserting jurisdiction over petitioner *did exist*, save only the fact that a product which it did not sell in Washington ultimately found its way here and produced injury.

The Supreme Court of the State of Washington, with these facts as its basis held that the courts of Washington had jurisdiction "inasmuch as the fact that the injury occurred in this state was sufficient to bring the case within the 'tortious act' classification." (Appendix A infra, page 3a.)

It found it "not necessary to decide" whether the "missionary work" referred to amounted to the "transacting of business . . ." in Washington, since it held that the fact that respondent's hop yards *located here* were damaged was a sufficient basis on which to predicate *in personam* jurisdiction over petitioner. (Appendix A infra, page 3a.)

B. The Federal Question and the Way It Arose

When summons and complaint were delivered to it, petitioner appeared specially in the Superior Court of Yakima County and moved to quash the service raising the question of the power of the state court to subject it to *in personam* jurisdiction under the due process

clause of the 14th Amendment (St. 6, Tr. 206). *Pennoyer v. Neff*, 95 U.S. 714 (1878), clearly established that the constitutional question of the power of the state over the person of the defendant is a federal question and may be raised directly. Upon the adoption by Washington of rules patterned after the Federal Rules of Civil Procedure, and while its special appearance and motion to quash was pending, petitioner moved to dismiss pursuant to the provisions of rule 12(b) on the ground, among others, of lack of jurisdiction over the person of petitioner (St. 20, Tr. 185). These motions were denied. Petitioner then answered and raised the jurisdictional question as an affirmative defense (Tr. 175). The question was again raised by renewed motion to dismiss at the beginning of trial (St. 44-46), by a motion to dismiss at the close of respondent's case (St. 2056), by motion for directed verdict (St. 2510), and after adverse verdict of the jury by motion for judgment n.o.v. (Tr. 34) all of which motions were denied. The question was presented to the Supreme Court of Washington both in petitioner's original briefs and oral argument and in the petition for rehearing. (Petitioner's briefs below and its motion for rehearing are included in the record certified by the clerk of the Supreme Court of Washington, Tr. 0289 and 0290).

REASONS FOR GRANTING THE WRIT

In recent years most of the States of the Union have adopted in one form or another statutes providing for

out-state service of process on non-residents, the so-called "long arm" statutes. The Washington statute is patterned after the Illinois Act. Impetus to adoption of such legislation was given by this court's opinions in *International Shoe Co. v. Washington*, 326 U.S. 310, (1945) and *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). However, in the *International Shoe Co.* case this court indicated the permissible limits of state power when it said that the defendant must "have certain minimum contacts with it [forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " (326 U.S. at 316).

Despite this stricture and the clear warning of this court in *Hanson v. Denckla*, 357 U.S. 235 (1958), that the cause of action must at least arise out of ". . . an act done or transaction consummated in the forum state." (357) U.S. at 251), the courts of many of the states have embarked upon a "collision course" in which one case becomes a stepping stone for the next in sweeping aside limitation on *in personam* jurisdiction over out-of-state manufacturers whose products either alone, or as components of another manufacturer's goods, are charged with failure which occasions injury. This trend has reached such proportions that no local manufacturer however small can manufacture in one state with any degree of assurance that whether he has or has not placed his goods in the stream of interstate commerce, he may not be

called upon to respond in the courts of some distant jurisdiction to which his goods may have found their way. The whole subject of *in personam* jurisdiction is replete with confusion, conflict and contradiction among and between the courts, both state and federal, and writers on the subject.

Thus, in *Velandra v. Regie National des Usines Renault*, 336 F.2d 292 (6th Cir. 1964) the court held that the minimum contacts were not present and dismissed the action. The suit was for injuries allegedly caused by defective brakes. The named defendant, a French car manufacturer, shipped its cars to its wholly owned subsidiary, a New York corporation. The subsidiary, in turn, sent the vehicles to regional distributors who sold them to independent local dealers. The court found that the required minimum contacts with the State of Michigan were not present. However, the California District Court of Appeals, on identical facts involving the same defendant, upheld the jurisdiction of California courts in *Regie National des Usines Renault v. Superior Court*, 208 Cal. App.2d 702, 25 Cal. Rpt. 530 (1964).

The Supreme Court of Illinois purported to assume *in personam* jurisdiction over a foreign manufacturer in *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961). The only contact with the forum state was the fact of injury in Illinois. This court disagreed with the prior construction of the statute by the United States District Court

for the Northern District of Illinois in *Hellriegel v. Sears, Roebuck & Co.*, 157 F. Supp. 718 (N.D. Ill. 1957), which represented a reasonable and constitutional construction of the Illinois statute. In a later case, *McMahon v. Boeing Airplane Co.*, 199 F. Supp. 908 (N.D. Ill. 1961) the judge who wrote the *Hellriegel* opinion expressed strong disagreement with the rationale of the *Gray* case, but felt himself bound by it under the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1937).

The Court of Appeals of New York disagreed with the *Gray* opinion in *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 209 N.E.2d 68 (1965). In this case a container of liquified propane gas being hauled from Pennsylvania to Vermont exploded in New York causing injury to the plaintiffs. The plaintiffs sued *inter alia* the manufacturer of the container, a Kansas corporation, which delivered the container to a Missouri corporation, which mounted it on a wheelbase and sold it to a Pennsylvania corporation, which was an interstate carrier by road. The New York court reversed and directed the dismissal of the action as to the manufacturer of the container.

There also is conflict between the United States District Court for the Eastern District of Michigan and the Court of Appeals for the Sixth Circuit. The position of the Court of Appeals in the case of *Velandra v. Regie National des Usines Renault*, 336 F.2d 292 (6th Cir. 1964) has been discussed above. The District Court in

Chovan v. E. I. DuPont De Nemours & Co., 217 F. Supp. 808 (E.D. Mich. 1963) sustains jurisdiction over a Connecticut manufacturer of fuses who shipped them to DuPont's warehouse in Chicago where they were combined with dynamite charges and shipped into Michigan.

There is, likewise, a conflict as to the constitutionally permissible extent of a state's power over a non-resident defendant between the Supreme Court of New Hampshire, *Roy v. North American Newspaper Alliance*, 205 A.2d 844 (N.H. 1964) and the United States Courts of Appeal for the Seventh and Fifth Circuits, *Insull v. New York, World-Telegram Corporation*, 273 F.2d 166 (7th Cir. 1959) and *Buckley v. The New York Times Co.*, 338 F.2d 470 (5th Cir. 1964). These cases involved the tort of libel and the amenability to substitute service of process of out-of-state defendants whose allegedly libelous publications have incidentally found their way into the forum state.

Minnesota is another state of conflict between state and federal courts on this issue. The United States District Court in *Mueller v. Steelcase, Inc.* 172 F. Supp. 416 (D. Minn. 1959) held that the mere fact of injury in the forum state is not sufficient to constitute a minimum contact within the due process clause of the 14th Amendment and quashed service of process. Thereafter, the Supreme Court of Minnesota disagreed and held that the fact of injury in Minnesota was sufficient to

confer jurisdiction of the out-of-state defendant on Minnesota courts, *Atkins v. Jones & Laughlin Steel Corp.*, 258 Minn. 571, 104 N.W.2d 888 (1960) and *Adamek v. Michigan Door Co.*, 260 Minn. 54, 108 N.W. 2d 607 (1961). The Federal District Court in Minnesota disagreed with the Minnesota Supreme Court on constitutional grounds in *Pendzimas v. Eastern Metal Products Corp.*, 218 F. Supp. 524 (D. Minn. 1961). The United States Court of Appeals for the Eighth Circuit in *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965) seems to lean toward the interpretation of permissible limits of state jurisdiction as adopted by the Minnesota Supreme Court without, however, fully resolving the conflict. The granting of the writ of certiorari in this case would materially help in the resolution of this burning problem. It may be further pointed out that the position of the Eighth Circuit in the *Aftanase* case is in direct conflict with the position of the Fourth Circuit in *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956).

The Supreme Court of Minnesota in *Ehlers v. U. S. Heating & Cooling Mfg. Corp.*, 267 Minn. 56, 124 N.W. 2d 824, 827 (1963), highlights the burning need for a resolution of the issue by this court:

> *"There is no decision of the United States Supreme Court directly in point. In the absence of specific controlling authority with respect to federal constitutional limitations on the power of the state to provide for service upon foreign corporations in*

> *the manner specified by* § 303.13, *subd.* 1(3), *it remains our opinion that service upon a foreign corporation in the manner prescribed is effectual to confer jurisdiction in cases such as this.* We feel justified, in view of the record, in concluding that the product here involved was manufactured by appellant corporation for use by the general public. It is not contended that the area of foreseeable use of the product was so limited as to exclude the State of Minnesota. The affidavit filed in support of the motions to dismiss did not negate the reasonable inference that the 'Fireball' boiler is a mass-production unit intended for nationwide use. The fact that such a product sold to a Chicago distributor would, in the regular course of distribution, be purchased and used by a Minnesota buyer would seem reasonably to have been anticipated by the manufacturer. Appellant, National Heating, does not claim by affidavit or otherwise that the 'Fireball' here involved acquired Minnesota situs in any way other than in the usual and customary marketing process vital to the conduct of a profitable enterprise. We conclude, therefore, that the situation is one controlled by our prior decisions. Whether a different result would follow in this case were the manufacturer to have established that the use of his product in Minnesota was not foreseeable need not be and is not determined. The order of the district court refusing to quash the service of process and to dismiss the proceedings against National Heating & Cooling Manufacturing Corporation is affirmed." (Emphasis supplied.)

The product involved in the *Ehlers* case was a boiler manufactured in Ohio and sold to one of the plaintiffs in Minnesota after it went through the hands of two independent wholesalers and one retailer. The facts in the case at bar are even more extreme since the technical heptachlor manufactured by petitioner is not

usable by a farmer, but must undergo further manufacturing. Furthermore, the heptachlor was not defective and was true to label.

Significantly, there is also a conflict between the Supreme Court of Washington and the United States District Court for the Eastern District of Washington. The latter court, in four cases involving suits by the hop growers against the petitioner herein for damages from the use of the formulation of the same product sustained motions to dismiss on the ground of lack of jurisdiction over the person of petitioner. The unpublished opinion of the court is attached hereto (Appendix D infra, page 13a). These cases involved the same defendant, the use of the same basic product and alleged injuries to hops occurring at about the same time. The differing results between those cases and this cannot be rationalized on the basis of factual differences.

Short of expression by this court, there appears no prospect of resolution of this welter of conflicting opinions and a litigant's rights would seem to depend only on his good or bad fortune in the selection of the court before which he must appear and not upon his activity or lack of activity in the forum.

The ultimate question to be answered is whether the mere happenstance of injury in the forum state is sufficient under the minimum contacts test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *Han-*

sen v. Denckla, 357 U.S. 235 (1958). We respectfully submit that it is not. The minimum contacts specified by this court must obviously mean some conscious and voluntary act of the nonresident, which would knowingly bring him into substantial contact with the forum. An unequivocal answer to this question will affect a great number of cases and will clarify this important problem involved in our federal scheme of dual sovereignty.

CONCLUSION

The assumption of *in personam* jurisdiction over petitioner by the courts of Washington deprived it of due process of law under the provisions of the 14th Amendment to the United States Constitution. There are irreconcilable conflicts between the various jurisdictions in both federal and state courts as to the constitutionally permissible reach of the statutes such as that here involved, the so-called "long arm" statutes. For these reasons, the writ of certiorari prayed for should be granted.

Respectfully submitted,

WILLIAM A. HELSELL
1610 Washington Building
Seattle, Washington 98101

Of Counsel:
HELSELL, PAUL, FETTERMAN, TODD
& HOKANSON
1610 Washington Building
Seattle, Washington 98101

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GOLDEN GATE HOP RANCH, INC., a corporation, *Respondent*, v. VELSICOL CHEMICAL CORPORATION, a corporation, *Appellant*.	No. 37411 Dept. One Filed June 17, 1965

The respondent, owner of a large hop ranch in Yakima County, Washington, obtained a jury verdict in the trial court for $215,027.26, in its suit brought against the manufacturer of a chemical called "heptachlor" for damage to its hop yards and lands, which the jury found was occasioned by the negligence of an agent of the appellant who recommended that the chemical be used on the hops.

The appellant's first contention is that its motion to quash service of process was improperly denied. A copy of the summons and complaint were served on a corporate officer of the appellant in Chicago, Illinois, on September 4, 1959. The statute which gives the courts of this state jurisdiction over a non-resident when he has been served personally outside this state, is RCW 4.28.185. That statute provides (in pertinent part):

> "(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdic-

tion of the courts of this state as to any cause of action arising from the doing of any of said acts:

"(a) The transaction of any business within this state;

"(b) The commission of a tortious act within this state;

"(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

"(4) Personal service outside the state shall be be valid only when an affidavit is made and filed to the effect that service cannot be made within the state."

The act upon which liability in this case was predicated was the writing and mailing of a letter from the Chicago office of the appellant corporation, recommending the use of heptachlor on hops. The letter was sent to an officer of the respondent corporation's parent corporation in New York. The appellant contends that, since this act did not occur in this state, the requirements of the statute were not met.

However, in the recent case of *Nixon v. Cohn*, 62 Wn. 2d 987, 385 P.2d 305, we held that, where damages result from negligence of a defendant, the injury occurring in this state is an inseparable part of the "tortious act," as that term is used in the statute. Consequently, the respondent brought itself within one of the subdivisions of the act and was entitled to take advantage of its provisions.

There was also evidence that, while heptachlor in its raw form is not sold in this state, but is sold to

manufacturers in other states who combine it with other ingredients to form usable pesticides, which are then sold through distributors in this state, the appellant manufacturer does engage in nation-wide advertising and has sent a representative to this state to do "missionary" work for the product.

The company also subsidizes a research laboratory at Washington State College, at Pullman, which conducts tests in the use of the chemical. A strong argument can be made that these activities were sufficient to constitute the transacting of business within this state, as that term is used in the statute. However, it is not necessary for us to decide whether the appellant's activities fall within that classification, inasmuch as the fact that the injury occurred in this state was sufficient to bring the case within the "tortious act" classification. *Nixon v. Cohn, supra.*

We note also in passing that it appears that the court in Yakima County was the most convenient forum in which to try the issues.

The appellant maintains that service was not effected according to the terms of the statute inasmuch as the affidavit required by paragraph 4 thereof was not filed until September 15, 1959, eleven days after the summons and complaint were delivered.

The statute does not provide that the affidavit must be filed *before* the summons and complaint are served,

but simply that the service will be valid only when such an affidavit is filed. Consequently, the service became valid when the affidavit was filed. Furthermore, we have the rule in this state that substantial and not strict compliance is sufficient where a proper affidavit is filed, although late, where it appears that no injury was done the defendant as a result of the late filing. *Whitney v. Knowlton*, 33 Wash. 319, 74 Pac. 469.

The appellant urges that its motion for a new trial should have been granted because of misconduct of the baliff. Five jurors made affidavits that the bailiff had told them, on Friday evening after they had been sent to begin their deliberations, that if they did not reach a verdict before ten o'clock that evening, they would be locked up for the weekend, because the judge would not be there to receive their verdict before Monday morning.

The bailiff denied that he made this statement, and other jurors signed affidavits that no such statement was made in their presence. The trial court found as a fact that the statement was not made. Since the evidence on the matter was conflicting, it was necessary that the trial court make a finding of fact as to whether the alleged misconduct occurred; and this court will accept the trial court's finding. *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651.

By its fourth assignment of error, the appellant ad-

vances the proposition that the evidence was insufficient to support a finding that it was guilty of negligence.

The evidence established that the respondent, through an agent of its parent corporation, applied to the appellant for information about the proper use of products containing heptachlor on its hop crops. The inquiry was inspired by the Miller Amendment of the Federal Food, Drug and Cosmetic Act pertaining to residues of pesticides on raw agricultural commodities, which might be harmful to human beings. The appellant's entomologist replied with the following letter:

"May 4, 1956

"Mr. S. Stinor Gimbel
S. S. Steiner, Inc.
655 Madison Avenue
New York 21, N. Y.

"Dear Mr. Gimbel:

"Your letter of April 27, 1956 was referred to me for answering since I have been handling our label acceptances.

"We have a release from the hop growers' association of Washington listing two types of applications for heptachlor on hops as follows:

"1—Fifty pounds of Heptachlor 2½% Dust per acre directed at the base of the plants. This application is made early in June.

"2—Apply five pounds of actual heptachlor to the soil before growth starts and disk into the soil.

"These applications would not leave a residue on the harvested part of the plant due to the timing of the applications.

"The Food and Drug Administration does not require tolerances if the application of heptachlor is made at a time that will not produce a residue.

Hence no tolerance for the use of heptachlor on hops is necessary if either of the above recommendations are used. I called the Plant Pest Control Board, Washington, D. C., who register labels, and they confirmed this opinion on tolerances.

"We trust this will give you the necessary information for passing out a release to your growers.

"Sincerely yours,
"VELSICOL CHEMICAL CORPORATION
J. Everett Bussart
Chief Entomologist"

"JEB:GC"

The writer of this letter did not know whether heptachlor would be harmful to hops, but he was aware that it had not been tested on hops, as this information was contained in a bulletin from the Washington Hop Growers, which he quoted in answering the respondent's inqury. However, he did not mention this fact in the letter. He was also aware that a label recommending use of the product on hop crops could not be used until tests had been made and approval of the federal government obtained. The appellant had never recommended use of the product on hops, but the respondent contends, and the trial court held, that this letter could be construed as a recommendation for its use.

If this letter did constitute a recommendation that the product be used on the respondent's hops, and if the appellant knew or should have known that the product was dangerous to hops, the appellant was negligent in not advising the respondent of the danger. It was for the jury to determine from the evidence whether or

not these elements of negligence were proved.

The fact that there was no privity of contract between the parties does not preclude the action based on a theory of negligence. In the recent case of *Nakanishi v. Foster*, 64 W.D.2d 660, 393 P.2d 635, we laid down the rule that a manufacturer or processor who offers goods on the market to remote users must use reasonable care where there is a foreseeable risk of harm if reasonable care is not used. It is true that in this case there was no negligence in the manufacture of the product and no defect in the product itself, but the jury could find that there was negligence on the part of the appellant's agent in not warning the prospective purchaser of a possible danger of which he was or should have been aware.

It is next contended that the court erroneously permitted the respondent to introduce evidence showing that the appellant made applications for label clearance for the use of heptachlor on hop crops after the correspondence with the respondent's representative. The appellant cites *Aldread v. Northern Pac. R. Co.*, 93 Wash. 209, 160 Pac. 429, which sets forth the familiar rule that the taking of precautions against future accidents is not an admission of negligence in the past and is not probative of such negligence.

The fact that the appellant made application for label clearance very shortly after he had answered the respondent's inquiry, does not tend to show that the

appellant knew the product was dangerous to hops when the inquiry was made, as the appellant points out. However, taken in conjunction with the evidence that label clearance is required by the federal government, it does show that he was aware of a possible danger, and was aware, or should have been aware, that no clearance had been obtained to recommend the product for use on hops.

Evidence of subsequent conduct is inadmissible only when it has no probative value on the issues before the court. 2 Wigmore on Evidence 3d ed., § 283. All facts are admissible in evidence which afford reasonable inferences or throw any light upon contested matter, and "relevancy" means the logical relation between proposed evidence and the fact to be established. *Chase v. Beard*, 55 Wn.2d 58, 346 P.2d 315. We do not find an abuse of discretion in the admission of this evidence. The appellant did not request an instruction limiting the purposes for which the evidence could be considered and consequently cannot complain that none was given.

Error is assigned to the admission in evidence of a lease containing an option to purchase, which the respondent negotiated to obtain additional land when 112 acres had to be taken out of production as a result of the damage done by the heptachlor. It is the appellant's contention that the option price for the purchase of roots and trellis was inadmisible to show the cost of replanting the 112 acres. As the respondent points out,

the lease was admitted to rebut an inference made by the appellant that the 112 acres was voluntarily abandoned, and no instruction was requested limiting its purpose. Consequently the fact that it was submitted to the jury without limitation as to its purpose cannot be claimed as error.

The appellant alleges that the court erred in allowing the jury to consider the respondent's claimed loss of sales of hop roots, because no sales of roots had been made in prior years. It cites our cases holding that lost profits cannot be recovered unless it is shown that the plaintiff's business has been in operation for such a period of time as to give it permanency and recognition, and that such business was earning a profit which could be reasonably ascertained and approximated. Because there was no evidence that the respondent had ever realized a profit from the sale of hop roots, the appellant maintains, this item of claimed damage was speculative and not recoverable.

Answering this contention, the respondent points to our recent case of *Larsen v. Walton Plywood Co.*, 64 W. D.2d 36, 51, 390 P.2d 677, wherein we observed that strict adherence to the "new business" rule can result in the denial of damages where justice requires their allowance and approved the rule laid down in *Barbier v. Barry*, 345 S.W.2d 557, 563 (Tex. Civ. App. 1961), as follows: Lost profits will not be denied merely because business is new if factual data is available to fur-

nish a basis for computation of probable losses.

There was evidence from which the jury could find that the respondent would have made substantial sales of slip roots in the years in question, although it had not made a practice of selling them in the past. There was evidence that such roots had been produced with fair abundance in the past and that the market for them had risen and they were bringing a good price. The evidence was sufficient to support a verdict and was not merely speculative.

The remaining assignments of error, which have been examined and found to be without merit, do not warrant discussion.

The judgment is affirmed.

ROSELLINI, C. J.

We concur:

OTT, J.

HUNTER, J.

HALE, J.

STAFFORD, J. Pro Tem

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GOLDEN GATE HOP RANCH, INC., *Respondent*, v. VELSICOL CHEMICAL CORPORATION, *Appellant*.	No. 37411

ORDER DENYING PETITION FOR REHEARING

The court having considered the appellant's petition for a rehearing herein and a majority of the judges being of the opinion that it should be denied,

IT IS ORDERED that the petition be and it is hereby denied.

Dated this 14th day of September, 1965.

By the court:

HUGH J. ROSELLINI,
Chief Justice.

APPENDIX C

"April 27, 1956

"S. S. Steiner, Inc.
605 Madison Avenue
New York 21, N. Y.
"The Velsicol Corporation
330 East Grand Avenue
Chicago 11, Illinois
"Attn.: Mr. L. P. Wilks, Director of Research
Re: Heptachlor tolerance on hops
"Gentlemen:

"We understand that you manufacture a chemical called Heptachlor.

"In view of the recent Miller Amendment of the Federal Food, Drug and Cosmetic Act, pertaining to residues of pesticides on raw agricultural commodities, we would like to have your recommendations on the tolerance and use of Heptachlor applied in or on hops. Is there a different tolerance established for soil application as well as foliage application?

"We want to pass this information on to our growers who are in doubt as to whether they can use Heptachlor under the new Federal regulation.

"Thanking you in advance, we are,

Very truly yours,
S. S. Steiner, Inc.
/s/S. Stinor Gimbell"

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON

SOUTHERN DIVISION

HELEN B. MERRILL, a widow, KENNETH SCHAEFER and JESSIE LOU SCHAEFER, husband and wife, and MARJORIE MERRILL, an unmarried woman,

Plaintiffs,

v.

VELSICOL CHEMICAL CORPORATION, a corporation,

Defendant.

No. 1491

C. G. TRUSELEY,

Plaintiff,

v.

VELSICOL CHEMICAL CORPORATION, a corporation,

Defendant.

No. 1492

OPINION

RAY POIRIER and ROSANNA POIRER, husband and wife,

Plaintiffs,

v.

VELSICOL CHEMIACAL CORPORATION, a corporation,

Defendant.

No. 1493

PETER STEINBOCK and CELIA STEINBOCK, husband and wife,

Plaintiffs,

v.

VELSICOL CHEMIACAL CORPORATION, a corporation,

Defendant.

No. 1494

Defendant has moved to dismiss the various complaints in the four cases captioned above. The motion is based on the ground of lack of jurisdiction over the persons of the defendants (Rule 12(b) (2) F.R.C.P.). The plaintiffs claim jurisdiction by reason of out-of-state service on the defendant under R.C.W. 4.28.180 and R.C.W. 4.28.185, which provide that a person outside the state, under certain circumstances, is subject to the jurisdiction of the courts of the State of Washington. The acts pertinent here are as follows:

> "(a) The transaction of any business within this state;
> (b) The commission of a tortious act within this state;
> (c) The ownership, use, or possession of any property whether real or personal situated in this state; * * *"

R.C.W. 4.28.185 also contains the following:

> "(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."

This statute is new to the State of Washington. It was passed in 1959 and appears in the Session Laws as Chapter 131, Laws of 1959. It had an effective date of June 11, 1959.

Rule 4(d) F.R.C.P. provides in part:

> "Summons: Personal service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as

follows * * * (7) upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

Under the two sections above, plaintiffs assert that service in the State of Illinois upon the defendant corporation was suffiicient to bring the corporation within the jurisdiction of this court.

From the files in these cases the situation appears to be substantially as follows:

The plaintiffs are all residents of the Southern Division of the Eastern District of the State of Washington. The defendant is a non-resident foreign corporation, organized and existing under and by virtue of the laws of the State of Illinois, where it had its principal place of business.

Plaintiffs assert in their complaints (paragraph IV) that at all times the defendant was a manufacturer of chemical products, which were placed upon the market by the defendant through distributors and retailers for the stated and recommended purpose of destroying and controlling various agricultural pests, and that the defendant did, during the times here mentioned, through its advertising and authorized agents, claim and assert

that said insecticide would destroy and control certain pests.

The plaintiffs further allege that on or about April 10 to 21, 1956, plaintiffs, relying upon the claims, advertising, assertions, information and warranties made by the defendant, purchased a dangerous substance known as Heptachlor, in reliance upon the claims, advertising, assertions, information and warranties to the effect that it was not dangerous and deleterious but reasonably fit for the intended use and purpose for which it was to be used.

Plaintiffs further allege that by reason of the application of the chemical Heptachlor to plaintiffs' land, the hop plants, fields and lands of the plaintiffs were damaged and the plaintiffs have sustained substantial monetary damage on account thereof.

The sole question for determination on the particular motion is whether the defendant has carried on such activities within the State of Washington as are contemplated by the statute, R.C.W. 4.28.185, thus entitling the plaintiffs to bring the action in the State of Washington and make service on the defendant in the State of Illinois.

From the briefs it is understood that the first two sub-sections are relied upon by the plaintiffs, that is, that the defendant was engaged in the transaction of business within the State of Washington and committed

tortious acts within the State of Washington, thus rendering defendant subject to the terms of the statute.

Plaintiffs have filed two affidavits of an agent of the defendant. The affidavits are made by Mr. Howard Beaudoin and are dated August 27, 1959, and November 6, 1959, respectively. From the affidavits it appears that the activities of the defendant corporation in the State of Washington consisted substantially of the following:

That an agent of the defendant visited the State of Washington for promotional and missionary purposes; that he conferred with county agents and discussed the chemicals manufactured by the defendant and discussed them with the distributors of the defendant's chemicals. The agent further and in addition gave recommendations to formulators and distributors or county agents upon request and frequently made recommendations and gave advice with respect to the use of the products of the defendant.

That the agent furnished to formulators and dealers and distributors printed pamphlets in quantities so that the printed material could be made available to the ultimate consumers explaining the use and method of application of the chemicals. He attended meetings of dealers handling chemicals. There was newspaper advertising in the State of Idaho, but there was no newspaper advertising in the State of Washington.

That most of the pamphlets brought to the State of Washington were distributed through the distributors or formulators to whom Velsicol sold its products. That the agent of Velsicol made no sales and did not solicit or take orders in the State of Washington. That the taking of orders was not one of the agent's duties. That none of the formulators referred to in the first affidavit of August 27, 1959, received delivery of Velsicol products or formulated products nor used Velsicol products within the State of Washington; that none of the Velsicol products were sold by the formulators within the state in the form in which they were acquired from Velsicol. That the products were always combined with other ingredients and the resulting compound sold as the product of the formulator. That to the best of the knowledge of the agent making the affidavit in behalf of the defendant there was no direct contact between any of the plaintiffs and the defendant corporation or its agents within this state. That they were completely unaware, until after the commencement of this suit, of the use of Heptachlor by the plaintiffs as referred to in plaintiffs' complaints. Affiant further states that he at no time recommended to anyone the use of Heptachlor on hops, nor was affiant aware that plaintiffs were contemplating any such use.

From the foregoing the court is called upon to determine whether the defendant at the time the cause of action arose was engaged in the transaction of any busi-

ness within the State of Washington or was engaged in the commission of a tortious act within the State of Washington.

It is true that false representations do constitute tortious actions. *Johns v. Bay Street Abrasive Products Co.*, 89 F. Supp. 654 (Maryland 1950), and *Bluff Creek Oil Company v. Green*, 257 F.2d 83, (5th Cir. 1958).

There must be a casual connection between the misrepresentations made and the particular cause of action asserted. Such was the case in the Bluff creek case. To hold that defendant here committed a tortious act by permitting distribution of pamphlets would appear to make an application of the statute far beyond that intended by the legislature.

The provision in sub-paragrph 3 of the statute that only cause of action arising from acts enumerated may be asserted against a defendant must mean that the cause of action arose from the tortious act committed within the state. To find no cause of action here arising from a tortious act committed within the state within the interpretation of similar statutes, as made by the courts, notably the following:

Johns v. Bay State Abrasive Products Co., 89 F. Supp. 654, 660 (supra)

Hellreigel v. Sears, Roebuck & Co., 157 F. Supp. 718 (Illinois, 1957)

Mueller v. Steelcase, Inc., 172 F. Supp. 416, (Minnesota, 1959)

Earlanger Mills v. Cohoes Fibre Mills, 239 F.2d 502 (4th Cir. 1956).

It is the conclusion of the court that the defendant is not subject to the jurisdiction of the court on the service made in the State of Illinois under the statute as claimed, as no tortious act within the contemplation of the statute was committed by the defendant within the State of Washington giving the court jurisdiction.

The plaintiffs likewise contend that the defendant was transacting business within the State of Washington and therefore comes within the perview of R.C.W. 4.28.185 (1) (a).

From the statements made by the affiant, the agent of the defendant corporation, it would appear that the defendant was primarily engaged in promoting the sale of the product within the State of Washington through a non-resident salesman, that it owned no property in the state, did not accept orders directly through the agents, and solely carried on a promotional activity in connection with the business.

There must be "minimal contacts" which are essential to the transaction of any business within the State of Washington, to subject the defendant to the jurisdiction of this court by service outside this state. Under the statements contained in the affidavits it would appear that such minimal contacts have not been shown to exist. This is supported by the cases cited above, and

by *Trippe Mfg. Co. v. Spencer Gifts*, 270 F.2d 821, (7th Cir., 1959).

The case of *McGee v. International Life Insurance Company* (1957), 355 U.S. 220, 78 S. Ct. 199, 2 Law Ed. 2d 223, is one of minimal contact in the State of California, which contact was conducted by mail directly with the defendant. This particular case has in some instances been limited to the insurance field. In any event it was the transaction of a type or item of busines directly with the plaintiff involved in that case, and for that reason does appear to be distinguishable from this case.

In the case of *Trippe Mfg. Co. v. Spencer Gifts* above cited, the defendant was actually and in fact sending advertising matter into the State of Illinois. That case would appear to be similar to the one here involved and no minimal contact was found.

For the reasons stated it is the opinion of the court that the Motion to Dismiss on the ground of lack of jurisdiction of the person of the defendant must be granted.

MOTION TO DISMISS ON GROUND STATUTE OF LIMITATIONS HAS RUN

As a second portion of its argument, defendant moves to dismiss on the ground that the statute of limitations has run and that all the causes of action are outlawed.

Further, the defendant asserts that the two-year statute of limitation applies.

In view of the fact that the first portion of defendant's motion is being granted, it does not appear proper for the Court now to pass on the second question. No ruling is called for because the dismissal for lack of jurisdiction takes with it the entire action.

The defendant may prepare the necessary order in the four cases granting Motion to Dismiss for lack of jurisdiction.

Dated the 1st day of September, 1960.

CHARLES L. POWELL,
United States District Judge

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No. 712

In the Supreme Court of the United States

October Term, 1965

VELSICOL CHEMICAL CORPORATION, a corporation,
Petitioner,

vs.

GOLDEN GATE HOP RANCH, INC., a corporation,
Respondent

Brief of Respondent to Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

C. W. HALVERSON
ALAN A. McDONALD
P. O. Box 1433
Suite 1, 303 East "D" Street
Yakima, Washington 98901
Attorney for Respondent

Of Counsel:
HALVERSON, APPLEGATE, McDONALD & WEEKS
P. O. Box 1433
Suite 1, 303 East "D" Street
Yakima, Washington 98901

FRANKLIN PRESS — YAKIMA, WASH.

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No. 712

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GOLDEN GATE HOP RANCH, INC., a corporation,
Respondent

Brief of Respondent to Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

COUNTERSTATEMENT OF FACTS

We offer the following factual summary as correcting certain inaccuracies and supplying certain omissions in the statement of the other side which bear materially on the issues presented by the petition.

Petitioner, Velsicol Chemical Corporation, is one of the world's largest manufacturers of chemical insecticides (St. 2298-99). It operates on a national and international level (St. 2298). It holds a basic patent on technical heptachlor which in its primary form is a brown waxy substance and useless as a pesticide (St.

1494, 2252). The utility and thus the commercial value of technical heptachlor can be realized only by formulating the product, i.e., by mixing it with different carriers or spreading agents (St. 1571-1577, Ex. 113).

Under federal law (7 U.S.C.A. § 135) such formulations of heptachlor or any other pesticide may be applied on products to be shipped in interstate commerce, only after the label setting forth the ingredients and the directions for use is approved by the U. S. Department of Agriculture (St. 2302). The U.S.D.A. will approve labels or "register" them only after certain minimal proof is submitted, establishing, *inter alia*, that the product is safe for use on a particular plant and will not cause damage to crops or to soil (U.S.C.A. 7, § 135, St. 2302).

Velsicol competes with other basic chemical manufacturers for the national and world markets (St. 1979). In that regard, Velsicol Chemical Corporation provides as a service to its customers, preliminary testing of formulations upon crops either through its own facilities or by subsidizing tests in agricultural experiment stations around the country, the assembling of information from County Extension Agents, experimental stations, and other sources, forwarding this information to the U. S. Department of Agriculture in Washington, D. C., and steering through this agency its application for approval of a "sample label" (St. 1971-85). When it has obtained "registration" or "label approval" for a certain formulation upon a spe-

cific crop, it is then in a position to go to its customer-formulators, such as Niagara Chemical Corporation, Geigy, Stauffer Chemical Co., California Spray Company, or Miller Products of Portland, Oregon, and say to them, in effect: we have developed a formulation which will control a certain insect on certain crops if applied according to our directions (St. 1503-1528, 1562-72). Further, we have satisfied the U. S. Department of Agriculture that this formulation, so applied, is safe to use and will not damage the soil or crops. Further, if you follow the sample label which we will provide to you and if you will formulate heptachlor according to a formulation manual which we will furnish you, you may safely ship the product in interstate commerce (St. 1503-28, 1562-72). Then in connection with and to enhance sales of its technical heptachlor, Velsicol furnishes to its formulator customers free sample labels, the form of which, as a result of Velsicol's efforts, has been approved by the U. S. Department of Agriculture, together with formulating manuals containing detailed instructions as to how their basic product should be formulated.

To enhance sales of its products into formulations containing heptachlor, Velsicol employed sales representatives (St. 1509-11). These individuals were responsible for traveling in the states making up their territory and doing "missionary work" (St. 15-18). This "missionary" work consisted of contacting the formulators, "provide them with the latest information

we had on label clearances, promotion literature we had, and encourage sales on those crops where we felt we could obtain additional sales on" (St. 1931). One such "missionary" for petitioner was Howard Beaudoin (St. 1924). Mr. Beaudoin's sales territory included Colorado, Montana, British Columbia, Oregon and Washington (St. 1933). His trips into Washington, as well as into other states, was by his own admission for the end purpose of increasing sales (St. 1932). One of the companies in Yakima that he called upon for the purpose of increasing sales was the Crop King Co. (St. 1934). In 1954 and 1955 Mr. Beaudoin throughout his territory was advocating the use of heptachlor to control strawberry root weevil (St. 1943). The control of this pest by use of heptachlor in the Yakima Valley was promoted by Beaudoin principally in conjunction with potatoes, cane fruits and alfalfa (St. 1935) although actually the labels bore no restrictions or warning as to possible dangers to other crops.

In the spring of 1955 infestation of hop yards by strawberry root weevil throughout the Yakima Valley had precipitated an informal meeting of hop growers who gathered at the Albert Gamache ranch near Toppenish, Washington, where John Keene, the County Extension Agent, and others identified the insect (St. 2122-23). Inquiry was directed to Dr. Klostermeyer, an entomologist, at the nearby Prosser Experimental Station. He in turn made inquiry to the experimental stations on the Western coast of Washington (which

had experimented with heptachlor on berry plants pursuant to subsidy by the appellant, Velsicol Chemical Corporation) (St. 1975-78). From his discussion with this source, a statement by Dr. Klostermeyer and Mr. Keene, the Extension Agent, was published and promulgated by a voluntary organization of the hop growers known as Hop Growers of Washington which suggested that the strawberry root weevil might be controlled by certain applications of heptachlor but which publication likewise contained in clear language a warning to the effect that there was no prior experience for the use of heptachlor on hops (St. 2101, Ex. 24, 105). This publication was called E.M. 21.

On one of his regular "missionary" trips into Yakima in the spring of 1955, Howard Beaudoin secured a copy of this bulletin (known as E.M. 21) and forwarded the same to his superior in Chicago, Mr. Bussart (St. 1945-46) (Ex. 118). This, according to Beaudoin, was part of a standard procedure to alert his home office of a possible new area for sales (St. 1947-48). Upon receipt of the telegram and the following bulletin, Bussart did nothing for the time being and simply filed this information away (St. 2311).

Meanwhile Back at the Ranch

Golden Gate Hop Ranch is one of the five largest yards in the Yakima Valley which area, in turn, produces 60% of the United States hop production and approximately 50% of the world's hop supply (St. 68).

Golden Gate Hop Ranch is a California corporation and the wholly owned subsidiary of S. S. Steiner, Inc., one of the largest hop brokers in the world (St. 69). Prior to its application of heptachlor, Golden Gate Hop Ranch had about 248 acres of hops in production (St. 99).

The Yakima manager of Golden Gate Hop Ranch was Mr. Drex Kelley (St. 66). He was assisted by a ranch foreman, namely, Emil Lenseigne. Mr. Kelley's immediate superior was Mr. Stinor Gimbel of New York City (St. 99). Mr. Gimbel was an officer and director of Golden Gate Hop Ranch, Inc. and likewise of S. S. Steiner, Inc., the parent corporation (St. 1670-72). Since taking over the direct supervision of the Yakima ranching operation, Mr. S. Stinor Gimbel had attempted to employ the most scientific production methods (St. 98-99). In connection with this, he established a program under which all applications of fertilizer, insecticides, pesticides, or rodenticides had to be cleared through his office located in New York City, N. Y. (St. 1690-92).

Thus, in early 1956, almost a year after the earlier meeting at Gamache Ranch, when Mr. Kelley realized that his yards in the Yakima Valley were infested with the strawberry root weevil, and after discussing it with his ranch foreman, Mr. Lenseigne, who had suggested the use of heptachlor to control the weevil, Mr. Kelley in turn called Mr. Gimbel in New York City advising him of his intentions in this respect (St. 119-

123). In keeping with the policy, Mr. Gimbel instructed Mr. Kelley to hold up on the application of heptachlor until he had an opportunity to check directly with the manufacturer and determine that they might safely use the product on hops without injury or damage to the hops or hop ground and also to ascertain that it would pose no problems under a recently adopted amendment to the Food, Drug & Cosmetic Act, known as the "Miller Amendment" (21 U.S.C. § 346 a-b) (St. 1656-57, St. 121-22). Thereupon, Mr. Gimbel wrote the following letter (Ex. 119A, St. 1656):

"April 27, 1956

"S. S. Steiner, Inc.
605 Madison Avenue
New York, N. Y.

"The Velsicol Corporation
330 East Grand Avenue
Chicago 11, Illinois

"Attn.: Mr. L. P. Wilks, Director of Research
Re: Heptachlor tolerance on hops

"Gentlemen:

"We understand that you manufacture a chemical called Heptachlor.

"In view of the recent Miller Amendment of the Federal Food, Drug and Cosmetic Act, pertaining to residues of pesticides on raw agricultural commodities, we would like to have your recommendations on the tolerance and use of Heptachlor applied in or on hops. Is there a different tolerance established for soil application as well as foliage application?

"We want to pass this information on to our growers who are in doubt as to whether they can use Heptachlor under the new Federal regulation.

"Thanking you in advance, we are,

Very truly yours,
S. S. Steiner, Inc.
/s/S. Stinor Gimbel

On receipt of this letter and with the only information then in his possession consisting of the telegram and the E.M. 21 bulletin received a year earlier from Mr. Beaudoin out in Yakima, Washington (St. 2310-23), without any knowledge of tests, experiments concerning the use of heptachlor on hops (St. 1997-2003, 2315-23), and with no other effort whatsoever to determine the safety of the use of his product on hops (St. 2323), Bussart wrote the reply letter (Ex. 119B) as follows:

"May 4, 1956

"Mr. S. Stinor Gimbel
S. S. Steiner, Inc.
655 Madison Avenue
New York 21, N. Y.

"Dear Mr. Gimbel:

"Your letter of April 27, 1956 was referred to me for answering since I have been handling our label acceptances.

"We have a release from the hop growers' association of Washington listing two types of application for Heptachlor on hops as follows:

"1—50 lbs of Heptachlor 2½% Dust per acre directed at the base of the plants. This application is made early in June.

"2—Apply 5 lbs of actual heptachlor to the soil before growth starts and disk into the soil.

"These applications would not leave a residue on the harvested part of the plant due to the time of the application.

"The Food and Drug Administration do not require tolerances if the application of heptachlor is made at a time that will not produce a residue. Hence no tolerance for the use of heptachlor on hops is necessary if either of the above recommendations are used. I called the Plant Pest Control Board, Washington, D. C., who register labels, and they confirmed this opinion on tolerances.

"We trust this will give you the necessary information for passing out a release to your growers.

"Sincerely yours,
"Velsicol Chemical Corporation
J. Everett Bussart
Chief Entomologist"

JEB:GC

Immediately thereafter and on the 7th of May, recognizing a vast new sales area for the product, Mr. Bussart undertook to obtain label clearance for the product heptachlor on hops (St. 2310-33, Ex. 114).

Relying upon a letter which closed with the expression of trust that its contents would result in a release to his growers for the use of heptachlor on hops, Mr. Gimbel did exactly that. He called Mr. Kelley and told him that the product was safe for use on hops (St. 123). He did this as a matter of fact by reading Mr. Bussart's letter to Mr. Kelley over the phone (St. 1663). Mr. Kelley then advised Mr. Lenseigne to proceed with the application of heptachlor (St. 123). This was done in accordance with the application recommended by Mr. Bussart in his letter (St. 124) and the product was distributed equally to the 248 acres of hops owned by respondent (St. 125-6).

The result was catastrophic. Little effect was noted

in connection with the 1956 crop. But slowly, insidiously, with the inroads through the root structure that became the hallmark of heptachlor everywhere it was used in the Yakima Valley, destruction of the healthy vigorous hop vines and the sterilization of the soil for growing them had been initiated (St. 128-9). Respondent's crops for the years 1957 through 1959 were virtually eliminated and the effect of the product is visible in the soil today!

ARGUMENT IN OPPOSITION TO ISSUANCE OF WRIT

Even if respondents were to concede that a review of the so-called "long-arm statutes," particularly the sections thereof basing jurisdiction upon the commission of a tortious act, was desirable, which we do not, we submit that the case at bar would provide a poor vehicle for doing so.

Further, if respondents were to acknowledge the disharmony of decision or inconsistency of result which petitioner seeks to portray, and again, we do not, we would urge that the case at bar cannot, on its facts, be employed as a basis for their reconciliation.

The Supreme Court of the State of Washington in keeping with most other jurisdictions aware of modern sales and promotional activities employed by manufacturers engaged in nationwide distribution, and the required adjustment of jurisdictional limitations to meet this development, has committed itself to the rule that given sufficient minimal contacts, and upon weighing the disadvantages and inconveniences to each party in selecting the forum, the place of damage is sufficiently the place of commission of a tortious act upon which to base jurisdiction, without offending traditional notions of fair play and substantial justice. *Nixon v. Cohn*, 62 Wn. (2d) 987, 385 P. (2d) 305; *Golden Gate Hop Ranch, Inc. vs. Velsicol Chemical Corporation*, 66 W. D. (2d) 455, 403 P. (2d) 351. This we

submit is in keeping with the pronouncements of this court and others to which we will refer.

However, we point out as a complete answer to the request for review of this case, that the jurisdiction of the Washington court could have as logically, and as constitutionally, been founded upon the activities of the petitioner within the forum state, as constituting the sufficient "transaction of business" within the requirements of *International Shoe Co. vs. Washington*, 22 Wn. (2d) 146, 154 P. (2d) 801, 326 U. S. 310.

A summary of petitioner's activities and their inevitable link to respondent's use of heptachlor and subsequent damage, keyed to the record, is contained in the following digest:

1. Prior to 1956 Velsicol Corporation sold and promoted formulations of heptachlor throughout the nation, including the state of Washington, and in fact throughout the world, knowing that they were going to be actually applied by remote users (St. 1494-98).

2. From 1953 to 1957, as a part of this program Velsicol Chemical Corporation subsidized Washington State College at Pullman and Washington State Experimental Stations to test heptachlor on various crops for the purpose of developing new markets through the development of new uses for formulations of heptachlor (St. 1975-78).

3. Velsicol Chemical Corporation employed a salesman who travelled into Washington, particularly into Yakima County, who did "missionary work" calling

on formulators, distributing sales and formulating information, calling upon County Extension Agents, looking for possible new uses for the product and keeping his superiors advised concerning his activities (St. 3, 1932-39).

4. The salesman's name was Beaudoin and one of the outlets he called upon in Yakima County was a firm known as Crop King Company (St. 1934).

5. From 1953 to 1957 formulations of heptachlor were sold in Washington for use on various crops for the control of strawberry root weevil. One source of supply was accomplished by appellant Velsicol selling heptachlor to Miller Products Company, an Oregon formulator, which sold to Crop King Company in Yakima, a distributor, which sold to Toppenish Hop Growers Supply, a retailer (St. 45-46).

6. County Extension Agent Keene and Dr. Klostermeyer in 1955 received inquiries from hop growers concerning the control of strawberry root weevil on hops (St. 2097).

7. In response thereto they called on Washington State College at Pullman and experimental stations subsidized by Velsicol requesting information (St. 2097, 2126-27).

8. Upon information thus received, they published a bulletin offering recommendations for the use of heptachlor on hops but with a clear warning that there was no history of prior use of heptachlor on hops (St. 2097, Ex. 24, 105).

9. In May of 1955 Beaudoin, Velsicol missionary and salesman, while in Yakima secured this bulletin and sent it to his superior, Mr. Bussart, in Chicago with an accompanying telegram (St. 1944-46).

10. One year later, April 27, 1956, Golden Gate requested from Mr. Bussart advice and instruction as to the use of heptachlor on hops in a letter from Stinor Gimbel to Mr. Bussart, (Ex. 119A).

11. On May 4, 1956, Mr. Bussart answered Mr. Gimbel's inquiry with a recommendation for the use of heptachlor on hops, knowing at the time he wrote it that there was no label clearance for use on hops, no information concerning its safety for use on hops, and withholding from the information which he had lifted from the year-old bulletin, the warning that there was no prior experience for the use of the product on hops (Ex. 119B, St. 2020-34).

12. Stinor Gimbel called Mr. Kelley in Washington in reliance upon Mr. Bussart's assurance and instructed him to use the product on hops.

13. Mr. Kelley's foreman then placed an order for heptachlor which was purchased in Toppenish at Toppenish Hop Growers Supply which had purchased it from Crop King, which had purchased it from Miller Products Company in Oregon, which had purchased it from the Velsicol Chemical Corporation (St. 45-46, 123-125).

14. Mr. Kelley proceeded with the application of the product on hops with the subsequent damage (St. 126).

Not only do we submit that there was a sufficient showing of doing business to meet the "minimum contacts" requirement of *International Shoe, supra,* but the Supreme Court of the State of Washington said as much in its opinion filed as Appendix A to the petition (pages 2a–3a):

> "The act upon which liability in this case was predicated was the writing and mailing of a letter from the Chicago office of the appellant corporation, recommending the use of heptachlor on hops. The letter was sent to an officer of the respondent corporation's parent corporation in New York. The appellant contends that, since this act did not occur in this state, the requirements of the statute were not met.
>
> "However, in the recent case of *Nixon v. Cohn,* 62 Wn. 2d 987, 385 P. 2d 305, we held that, where damages result from negligence of a defendant, the injury occurring in this state is an inseparable part of the 'tortious act,' as that term is used in the statute. Consequently, the respondent brought itself within one of the subdivisions of the act and was entitled to take advantage of its provisions.
>
> "There was also evidence that, while heptachlor in its raw form is not sold in this state, but is sold to manufacturers in other states who combine it with other ingredients to form usable pesticides, which are then sold through distributors in this state, the appellant manufacturer does engage in nation-wide advertising and has sent a representative to this state to do 'missionary' work for the product.
>
> "The company also subsidizes a research laboratory at Washington State College, at Pullman, which conducts tests in the use of the chemical. A strong argument can be made that these activities were sufficient to constitute the transacting of business within this state, as that term is used in

> the statute. However, it is not necessary for us to decide whether the appellant's activities fall within that classification, inasmuch as the fact that the injury occurred in this state was sufficient to bring the case within the "tortious act" classfication. *Nixon v. Cohn, supra.*
>
> "We note also in passing that it appears that the court in Yakima County was the most convenient forum in which to try the issues."

Thus, even if this court were to review jurisdiction based upon the commission of a tortious act within the State of Washington because the fact of damage occurred there, and even if the Court determined that this exceeded constitutional limitations, all that could result would be a referral of the case back to the Supreme Court of the State of Washington for its determination of whether there had been sufficient activities to constitute the transaction of business within the state. From the cited portion of the opinion it is fairly clear as to what the decision of the Washington Supreme Court would be!

ANSWER TO PETITIONER'S ARGUMENT

Petitioner's brief cites several cases which it contends are "replete with confusion, conflict and contradiction" (page 10) and which constitute a "welter of conflicting opinions" (p. 15). Analysis of the cited cases reveals substantially otherwise. At page 10 of its brief petitioner cites *Velandra vs. Regie National des Usines Renault*, 336 F. (2d) 292 (6th Cir. 1964) and *Regie National des Usines Renault vs. Superior Court*, 208 Cal. App. (2d) 702, 25 Cal. Rpts. 530 (1964), as reaching conflicting results "on identical facts" yet the court in *Velandra* distinguished the California case by noting that:

> "While the legal principles there enunciated as distinguished from the factual situation there before the court, may be relevant to a resolution of the legal issues of 'minimum contact' and 'fair play' in this case, under the facts as they appear in the record of this case we are of the opinion that no sufficient showing has been made with reference to sales of the defendant's products within Michigan to establish such minimum contacts within the State as to warrant subjecting the defendants to the personal jurisdiction of a court in Michigan." (336 F. 2d at 297).

Petitioner then (pages 10–11) cites *Gray vs. American Radiator and Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961); *Hellriegel v. Sears, Roebuck & Co.*, 157 F. Supp. 718 (N.D. Ill. 1957); and *McMahon vs. Boeing Airplane Co.*, 199 F. Supp. 908 (N.D. Ill. 1961), all construing Illinois law, as contributing to the alleged confusion in the law. The only

conflict that exists between these cases is the denial of jurisdiction in *Hellriegel*, a result recognized by the same District Court judge in the *McMahon* case as being no longer controlling. Any conflict that did exist between these cases was resolved by *McMahon*.

Gray, supra, and *Longines Wittnauer Watch Co. vs. Barnes & Reinecke, Inc.*, 209 N.E. 2d 68 (N.E. 1965) (actually *Feathers vs. McLucas*, a consolidated case) admittedly reach opposite results on the issue of whether injury in the forum state supports jurisdiction. This is not, however, the result of differing views of the pertinent constitutional limitations. The New York court was concerned solely with a problem of statutory interpretation, whether its local long arm statute provided for the imposition of jurisdiction in such an event. The court simply held that it did not, and the question of due process was never reached.

Velandra vs. Regie National des Usines Renault, supra, and *Chovan vs. E. I. DuPont de Nemours & Co.*, 217 F. Supp. 808 (E. D. Mich. 1963) may be to some extent in conflict but *Chovan* involved blasting caps and fuses, and the *Velandra* court recognized that "the nature of the product may well have a bearing upon the issue of minimum contact, with a lesser volume of inherently dangerous products constituting a more significant contact with the state than would a larger volume of products offering little or no hazard to the inhabitants of the state." (336 F. 2d at 298). Neither case has any applicability to the case at bar, however,

for neither even mentioned the tort aspect of the applicable long arm statute. Whatever relevancy petitioner finds in these cases to the question of jurisdiction imposed solely because of injury in the forum state, completely escapes us.

The newspaper libel cases (Pet. Br. p. 12), *Roy vs. North American Newspaper Alliance*, 205 A. (2d) 844 (N.H. 1964); *Insull vs. New York World Telegram Corporation*, 273 F. (2d) 166 (7th Cir. 1959), cert. denied, 362 U. S. 942; and *Buckley vs. The New York Times Co.*, 338 F. (2d) 470 (5th Cir. 1964), are easily reconciled, as each turned on the amount of business contacts found to exist in the particular case. Only *Insull* even mentioned the tort section of the applicable long arm statute, and this was held to be inapplicable in light of the Illinois single publication rule that renders the tort of libel absolutely complete at the time of the first publication of the defamatory article, an event that took place outside of the State of Illinois.

The "significant conflict" in cases related to the case at bar (paraphrase petitioner's brief, p. 15) between the Washington Supreme Court and the U. S. District Court for the Eastern District of Washington where similar cases were dismissed, contrary to petitioner's assertion, occurred only because the motion to quash was ruled upon by the District Court before respondent had completed its discovery and had learned of the scope of petitioner's activities within this state. Moreover the Eastern District Court's memorandum was

written prior to the Illinois case of *Gray vs. American Radiator and S. S. Corp.*, 22 Ill. (2d) 342, 176 N. E. (2d) 761 (1961), which was adopted by the Washington State Supreme Court in the case of *Nixon vs. Cohn, supra.* That the District Court would rule otherwise were these cases presented to it today, would appear to be required by *Erie R. Co. vs. Tompkins*, 304 U. S. 64. See, e. g. *McMahon vs. Boeing Airplane Co.*, 199 F. Supp. 908 (N.D. Ill. 1961).

The state and federal court cases involving Minnesota law admittedly are in conflict on the question of injury alone being a sufficient contact to support jurisdiction. The state cases are unanimous in holding that such meets the *International Shoe* test, but the District Court cases are not. It should be noted, however, that this precise question has yet to be determined by the Eighth Circuit Court of Appeals, whose sole decision to date is *Aftanse vs. Economy Baler Co.*, 343 F. (2d) 187 (1965) which is perhaps one of the best reasoned cases in this field. There, although the tort injury theory was applicable, it was coupled with substantial business contacts of the foreign corporation to the forum state, and the case turned on the basis of the contacts found to exist.

Turning again to petitioner's argument, we must take issue with its analysis of cited authority. Petitioner errs, for instance, in its statement on page 9 of its brief that *Hanson vs. Denckla*, 357 U. S. 235, requires that

> ". . . the cause of action must at least arise out of '. . . an act done or transaction consummated in the forum state.' "

This is not only unwarranted but creates a misleading inference due to its being lifted out of context. The full quote is as follows:

> "The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum state. In that respect, it differs from *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 201, 2 L. Ed. (2d) 223, and the cases there cited." (357 U. S. at 251).

That *Hanson* did not decide that the cause of action must arise out of an act done or transaction consummated in the forum state is clear from the full text of the quote. Further, that the cause of action need *not* arise out of an act done or transaction consummated in a forum state is the clear holding of this court in *Perkins vs. Benquet Consol. Mining Co.*, 342 U. S. 437, and *Travelers Health Ass'n vs. Virginia*, 339 U. S. 643.

Petitioner then seeks sympathy for its position by stating:

> "This trend (expansion of in personam jurisdiction over non-residents) has reached such proportions that no local manufacturer, however small, can manufacture in one state with any degree of assurance that whether he has or has not placed his goods in the stream of interstate commerce, he may not be called upon to respond in the courts of some distant jurisdiction to which his goods may have found their way." (Pet. Br. p. 9).

As applied to the instant case, this statement has no validity whatsoever. First, petitioner is not a small

local manufacture, but one of the world's largest manufacturers of chemical insecticides and operates on a national and international level (St. 2298-99).

Next, the inference that Washington was an unforeseeable forum (". . . in some jurisdiction") also is without merit. The correspondence between petitioner and respondent (Pet. Br. p. 12A and pp. 5A-6A) made it abundantly clear to petitioner that the respondent desired to distribute the requested information to its hop growers. Respondent is one of the largest brokers of hops in the world (St. 69). The State of Washington (Yakima Valley therein) produces approximately sixty per cent of all hops grown in the United States and approximately fifty per cent of the world's supply (St. 68). Petitioner's chief entomologist, Mr. Bussart, as a result of respondent's letter to him, admittedly recognized a vast new sales area for the Velsicol product, heptachlor, through its potential use on hops (St. 2336). The information Mr. Bussart gave to Mr. Gimbel had been sent to him the year before from the State of Washington. It had been sent to him by one of his sales representatives who was in Yakima, Washington for the very purpose of distributing Velsicol literature and brochures and to alert his Chicago office to new sales areas within the state (St. 2310-33). Further, petitioner's said "missionary" representative, Mr. Beaudoin, on his trips into the State of Washington, contacted formulators and growers and experimental stations in that state for the purpose of increasing

sales of Velsicol products there (St. 1931-43). To suggest that petitioner could not foresee its goods flowing into the State of Washington for use on hops is to ignore the obvious. Nor can we understand in light of these facts, how the decision can be cited as an example of forum shopping!

ARGUMENT IN SUPPORT OF JUDGMENT

Petitioner asserts a need for clarification in an area where the guidelines are quite clear. The decisions of this court from *International Shoe Co. vs. Washington*, 326 U. S. 310, through *McGee vs. International Life Insurance Company*, 355 U. S. 220, and *Hanson vs. Denckla*, 357 U. S. 235, contain the following criteria to be employed in determining if jurisdiction is properly founded:

1. The quantity of the contacts,
2. The nature and quality of the contacts,
3. The source and connection of the cause of action with those contacts,
4. The interest of the forum state,
5. The convenience of the forum to the parties.

With those standards in mind this Court stated in *Perkins vs. Benquet Consol. Mining Co.*, 342 U. S. 437 at page 445, that each case is to be resolved in the light of its own facts.

If the Court will review the digest, *supra*, of petitioner's activities in the State of Washington it will note the presence of every factor listed by its decisions to date. It will readily appear that jurisdiction was imposed by the Washington court on a far broader basis than the "sole" fact of injury occurring within that state.

It would be difficult to find a decision closer on its facts than *Aftanse, supra*, and we feel that a quotation from that case is an appropriate summary of our position:

"We also think it is fair to say that these five Supreme Court cases establish only general and not precise guidelines. Perhaps they purposely do no more than this . . . We observe, . . . that at one time or another in the opinions, three primary factors, namely, the quantity of the contacts, the nature and quality of the contacts, and the source and connection of the cause of action with those contacts, are stressed, and that two others, interest of the forum state and convenience, receive mention.

". . . The Supreme Court has certainly not indicated that all five of these factors must be present in substantial degree for jurisdiction to be constitutionally effected . . .

"We here have more than the minimum contacts which the Supreme Court has prescribed as the standard . . ." (343 F. [2d] 197).

We submit in conclusion that the standards prescribed by this Court and the authorities cited are not only constitutionally sound, but abundantly clear. Whatever problems attend their application involve the familiar difficulties which trial courts face from day to day in the application of legal principles to factual differences. It is appropriate, however, to remind ourselves from time to time that that is the traditional responsibility of trial courts. Any other system will only serve to make this tribunal the arbiter of a never-

ending flow of factual determination. To the end of avoiding such an impractical task we respectfully submit that the petition should be denied.

Respectfully submitted,

C. W. HALVERSON
ALAN A. MCDONALD
P. O. Box 1433
Suite 1, 303 East "D" St.
Yakima, Washington 98901

Of counsel:

HALVERSON, APPLEGATE, MCDONALD & WEEKS
P. O. Box 1433
Suite 1, 303 East "D" St.
Yakima, Washington 98901

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No. 712

In the
Supreme Court of the United States

OCTOBER TERM, 1965

VELSICOL CHEMICAL CORPORATION, a corporation,
Petitioner,

— VS. —

GOLDEN GATE HOP RANCH, INC., a corporation,
Respondent.

PETITIONER'S BRIEF IN REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

WILLIAM A. HELSELL,
1610 Washington Building
Seattle ,Washington 98101
Attorney for Petitioner.

Of Counsel:
HELSELL, PAUL, FETTERMAN, TODD
& HOKANSON
1610 Washington Building
Seattle, Washington 98101

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WILLIAM A. HELSELL,
1610 Washington Building
Seattle ,Washington 98101
Attorney for Petitioner.

Of Counsel:
HELSELL, PAUL, FETTERMAN, TODD
& HOKANSON
1610 Washington Building
Seattle, Washington 98101

THE ARGUS PRESS SEATTLE, WASHINGTON

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PETITIONER'S BRIEF IN REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

INTRODUCTION

As stated in Petitioner's petition for a writ of certiorari herein, (Pet., p. 2) the questions presented by the petition are two:

1. Whether delivery of summons and complaint to petitioner's comptroller at its main office and place of business in Chicago, Illinois, was effective to confer *in personam* jurisdiction of petitioner on Washington courts under the provisions of the due process clause of the 14th Amendment of the United States Constitution.
2. Whether, constitutionally, a state may subject a foreign corporation to *in personam* jurisdiction of its courts in a case based solely upon alleged tort where the tortious conduct, if any, was completely outside

> the territorial limits of the state and the sole basis for such jurisdiction is the fact that the injury occurred within the state.

The immediate question before the Court at this stage is whether a writ of certiorari should issue to the Supreme Court of the State of Washington for the review of these questions. Therefore, the discussion in this reply will be directed to demonstrating that the petition presents a substantial federal question which greatly needs resolution by this Court. We believe that this case presents a near perfect opportunity for the Court to more precisely describe and define the present standards of state court jurisdiction over non-residents than has been presented since *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L.ed 2d 1283 (1958).

THIS CASE IS AN IDEAL VEHICLE FOR AN IMPORTANT, CLARIFYING DECISION

Because of the fact that the Washington Supreme Court boldly based its decision on the single premise that injury occurring in Washington, without more, provides a sufficient foundation for assertion of *in personam* jurisdiction over petitioner, an ideal opportunity is presented for the first time for this Court to provide the bench and bar with definitive guide lines in the area of *in personam* state jurisdiction over non-residents. The facts are set out in detail in the petition and are briefly reviewed again here only to correct misleading inferences which have been left by respondent's brief.

The judgment in this case was based solely on the

alleged negligence of the petitioner in writing a letter (Ex. 119B) from Chicago, Illinois, to respondent's parent corporation in New York City. That was the *only act* by petitioner which was found by the jury to be negligent, and it obviously occurred wholly and entirely *outside* the State of Washington. The Washington Supreme Court held petitioner liable on the theory that the alleged tort occurred at the place of the injury, and that no act or conduct of petitioner *within* the state was necessary to the assertion by Washington of personal jurisdiction.

The basis of the Washington Supreme Court's holding is plain from the following words of its opinion (Appendix A to Petition, p. 2a):

> "The act upon which liability in this case was predicated was the writing and mailing of a letter from the Chicago office of the appellant corporation, recommending the use of heptachlor on hops. The letter was sent to an officer of the respondent corporation's parent corporation in New York. The appellant contends that, since this act did not occur in this state, the requirements of the statute were not met.
>
> "However, in the recent case of *Nixon v. Cohn*, 62 Wn.(2d) 987, 385 P.(2d) 305, we held that, where damages result from negligence of a defendant, the injury occurring in this state is an inseparable part of the 'tortious act,' as the term is used in the statute. Consequently, the respondent brought itself within one of the subdivisions of the act and was entitled to take advantage of its provisions."

It is important to note that the letter from respondent's parent corporation (in New York City) to petitioner (in

Chicago) (Ex. 119A) requested information relating to the Miller Amendment to the Food, Drug and Cosmetic Act (21 U.S.C. §346 a-b), which is concerned with chemical residues on plants which are harmful to *human beings*. Contrary to the intimation of respondent in its brief (pp. 6-7), there is nothing in the record, anywhere, to indicate that respondent ever requested any information relating to the effect of a heptachlor formulation on *crops or soil*. Exhibits 119A and 119B are the only communications ever exchanged by petitioner and anyone connected with respondent. Clearly Mr. Gimbel's letter was not concerned with damage to plants or soils. (These letters are set forth in full in respondent's brief at pp. 7-9). Nor do respondent's citations to the record at pages 6-7 of its brief support the contention that Mr. Gimbel was so concerned. St. 119-23 contains no testimony which would show or even indicate what Mr. Gimbel's concern was. St. 1656-57, together with St. 1663, indicates that the danger to human beings from chemical residues (the subject of the Miller Amendment) was Gimbel's *only* concern. Petitioner's product, heptachlor, was *not* defective, but rather was true in all respects to its label and in full and complete compliance with 7 U.S.C.A. §135. That statute, cited by respondent, is entirely unrelated to the Miller Amendment. We emphasize the foregoing facts because it is important to note that in all of the tort cases relied on by respondent in which personal jurisdiction over non-residents was sustained, there was involved

either a *defective* product or *intentionally* tortious conduct.

The opinion of the Washington Supreme Court accurately stated (Pet., Appendix A, p. 7a.)

> "It is true that in this case there was no negligence in the manufacture of the product and no defect in the product itself . . . ."

PETITIONER DID NOT HAVE THE REQUIRED "MINIMAL CONTACTS" WITH WASHINGTON

The Washington Supreme Court found it "not necessary for us to decide" whether petitioner's other activity in Washington amounted to the transacting of business within the State of Washington, as that classification is set forth in the Washington "long-arm statute" (R.C.W. 4.28.185). As we will discuss further below, the record here is devoid of evidence showing that the isolated sporadic contacts between petitioner and Washington were sufficient to constitute the transaction of business or that such contacts had anything whatever to do with respondent's cause of action.

As to both the "commission of a tortious act" and the "transaction of any business" classifications, the Washington statute requires that the act or conduct which is tortious or which constitutes the transaction of business *must take place in the State of Washington*, and that the local plaintiff's cause of action *must arise from* such in-state act or conduct. R.C.W. 4.28.185 (1)(a) and (b) and (3).

The Washington statute is a verbatim copy of the Illinois Statute. (Ill. Rev. Stat. 1959, Chap. 110, par. 17). Both of these statutes were enacted in 1959 after the decision by this Court in *Hanson v. Denckla,* 357 U.S. 235, 78 S. Ct. 1228, 2 L.ed 2d 1283 (1958). The legislators who adopted those laws appear in each instance to have conscientiously followed the requirement discussed in *Hanson v. Denckla* that the plaintiff's cause of action *arise out of* the defendant's forum state activity before subjecting the non-resident defendant to jurisdiction.

It is petitioner's contention that the construction of the Washington "long-arm statute," as applied to the petitioner by the opinion of Washington's Supreme Court, violated the due process requirements of the 14th Amendment to the United States Constitution. As to the "tortious act" holding, where all of the alleged tort feasor's conduct occurs *out of* the forum state *and its sole contact with the state is the fact that the injury took place there,* the "minimal contacts" requirement laid down by *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L.ed 95 (1945), reaffirmed in *Hanson v. Denckla, supra,* and discussed further in *Rosenblatt v. American Cyanamid Co.,* 381 U.S. ____, 86 Ct. 1, 15 L.ed 2nd 39 (1965) is not satisfied. That is true particularly of this case, where the causal relationship between the alleged negligence and the alleged damage is so tenuous, and where the product which caused the damage was not defective but was entirely true to its label.

As to the "transaction of any business" question, which was not ruled upon by the Washington Court, petitioner's slim and isolated contacts, none of which were *in any manner* related to respondent's cause of action, surely cannot rise to the level of the required minimal contacts. While the Washington Court did not so rule, the suggestion by respondent that it would so rule on remand is specious. On the basis of the two isolated visits to this state by petitioner's "missionary," neither of which had any connection with respondent's cause of action, a holding by the Washington Supreme Court that petitioner's conduct constituted the "transaction of business" would be as violative of the due process requirements of the 14th Amendment as is the decision at which the present petition is directed.

Respondent attempts to make much of the fact that one Howard Beaudoin represented the petitioner in Washington and infers that this representation was somehow connected, as required by the Washington "long-arm statute," with respondent's cause of action. Nothing could be farther from the truth. Mr. Beaudoin made *at most* two trips to Washington prior to the alleged tort in 1956 (St. 3, 1939, 1957) and when he came to Washington he was not engaged in any *sales* effort whatever (St. 10, 17). Nor did Beaudoin call on *anyone* (let alone an ultimate and remote consumer such as respondent) for the purpose of making sales. Nor was Crop King Co. (the middleman in the ultimate sale to respondent) a customer of Beaudoin's

or of petitioner's, as respondent obliquely suggests; in fact, petitioner sold heptachlor only to formulators, *none of which were in Washington* (St. 17, 1955-6), and *refused* to sell to Crop King (St. 1963, 2087). Petitioner had never sold heptachlor with the intent that it be used on hops (2294). Beaudoin testified that he had never recommended heptachlor to anyone for use on hops (St. 1946) and that he told jobbers *not* to sell heptachlor formulations for hop use (St. 1947-8, 1953). A reading of Beaudoin's affidavits (St. 3, 15) and his deposition (St. 1921) will demonstrate that the record is completely *devoid* of any evidence connecting Beaudoin's two Washington visits with respondent or with its cause of action.

At pages 4-5 of respondent's brief, an attempt is made to connect petitioner with the State of Washington through a Dr. Klostermeyer, who it is claimed obtained information from a western Washington experimental station to which petitioner at some unspecified time in the past had given some money to assist it in experiments, and that Dr. Klostermeyer conveyed this information in a memorandum, E.M. 21 (Ex. 24), to a private group of farmers in Washington. The truth of the matter, however, is that Dr. Klostermeyer, according to his own testimony, obtained the information which went into E.M. 21 from a Dr. Rosensteil at *Oregon* State University (St. 2100), and *not* from any source in Washington or from petitioner (St. 2099). Nowhere in the record is there any testimony that petitioner was at any time connected with Dr. Rosensteil

or with Oregon State University. Nor is there any testimony that respondent ever received or used any information supplied to it by Dr. Klostermeyer. Any research subsidy by petitioner of a western Washington experimental station had no connection *whatever* with respondent or with its cause of action.

Finally with respect to the facts of this case, which respondent represents, at pages 12-14, to provide the "inevitable link" between petitioner's activities and respondent's use of heptachlor, the truth is that respondent's recitation is but a series full of missing links. It is essential that these facts be set straight in order to show the almost total lack of even the vaguest contact between petitioner and the State of Washington. Our answer to respondent's factual discussion will be in numbered paragraphs corresponding to those used by respondent at pages 12-14 of its brief.

1. Contrary to respondent's assertion, petitioner *at no time sold, nor did it solicit the sale of its product heptachlor to anyone in the State of Washington* (St. 9-14). Petitioner's formulator customers were all located *outside* Washington (St. 17, 1955-6). The citation by respondent to the record (St. 1494-98) makes no reference to sales in the State of Washington.

2. Petitioner did provide a modest grant (under $1,000 sometime between 1953 and 1957 [St. 1975-78]) to Washington State University which operated two agri-

cultural experiment stations in western Washington, at Puyallup and Mt. Vernon, much as other corporations give grants to educational and research institutions all over the United States. Certainly this is not the kind of contact which will render petitioner amenable to Washington jurisdiction, particularly when it is understood that the grant was *in no way whatever* connected with respondent or its cause of action. The record is totally silent as to any such connection.

3., 4. & 5. Howard Beaudoin's contacts with Washington were fully explored above. The range of Beaudoin's activities set forth by respondent were a part of his job as *regional* missionary for Oregon, Washington, Idaho, Montana, Wyoming, Utah, South Dakota, California, Colorado and two Canadian provinces (St. 16). He lived in Portland, Oregon (St. 3). Neither Beaudoin nor petitioner dealt with any formulators in Washington (St. 1955-6, 1963). Further, Beaudoin had made only two trips *at most* to Washington by the time respondent had used a heptachlor formulation. (St. 3, 1939, 1957). As to calls made on Crop King Co., as stated above, *no sales were made by petitioner or Beaudoin to that company* (St. 1934, 1963), and in fact petitioner refused to sell to Crop King or to have it act as one of petitioner's formulators (St. 2072, 2087). Respondent claims to have purchased the insecticide which damaged its hops from Toppenish Hop Growers Supply (Toppenish, Washington), which had acquired the formula-

tion from Crop King Co. (Yakima, Washington), which had purchased it from Miller Products Co. (Portland, Oregon) (Tr. 166). Crop King used its own label (Ex. 34), and there was, according to the testimony of the operator of Crop King Co., no connection between Beaudoin and the formulation containing heptachlor (St. 2086). Petitioner's contact with its product came to an end when it sold it to Miller Products Co. in Portland, *Oregon;* Miller Products then mixed, or formulated, the heptachlor with other ingredients to form the insecticide which eventually found its way, still true to petitioner's original label and under a new label of the distributor, through the hands of several middlemen to respondent's hops. At no time was any claim made that petitioner's product was defective and the Washington Supreme Court correctly observed that it was not (Pet., Appendix A, p. 7a).

6., 7., 8. & 9. These four paragraphs constitute, perhaps, respondent's most obvious misstatement of the facts. Dr. Klostermeyer's connection with petitioner was non-existent by his own testimony (St. 2099-100). Furthermore, his collection of the data which he put in the bulletin (Ex. 24, 105) was not even remotely connected with petitioner, whether directly, through some obscure grant-in-aid relationship to Washington State University or its experiment stations, or otherwise. That data, by Dr. Klostermeyer's own testimony (St. 2100) came entirely from a paper written by a

professor in *Oregon* and the record contains no hint of any connection between that data and the petitioner. It should be noted that Howard Beaudoin had not appeared on the scene in this region (the Pacific Northwest) until *after* this bulletin was published, despite respondent's obvious liberties with the chronology. Nor is there any evidence in this case that respondent was in any way influenced by Dr. Klostermeyer's bulletin to use the heptachlor formulation.

10. & 11. These paragraphs involve the two letters (Ex. 119A and B) exchanged between petitioner, in Chicago, and respondent's parent corporation in New York, and obviously involve no activity in the State of Washington. This matter is discussed in detail above, and it is sufficient here to restate simply that the letters pertained only to chemical residues on crops which might be harmful to *humans*, not to any problem related to *crop damage*. No representation about its safety as to crops was requested or made; petitioner's letter merely answered the question raised by respondent's letter. Both letters are set out in respondent's brief at pp. 7-9.

12., 13. & 14. These paragraphs do not even purport to show any contact between petitioner and respondent or between petitioner and the State of Washington.

In summary the best effort which can possibly be truthfully mustered by respondent to show that petitioner en-

gaged in the transaction of business in Washington, *which transaction gave rise to petitioner's cause of action* is:

1. Petitioner employed a "missionary" who lived in Oregon and who made at most two trips to Washington for the purpose of calling on county agents and distributors of heptachlor formulations manufactured by others. His concern was solely with the use of heptachlor formulations on crops for which it had been properly cleared, and he *never* recommended the substance for use on hops (St. 1946). He conducted *no* sales transactions in this state and did not even know of respondent's existence until this lawsuit was started.

2. Petitioner once gave money to Washington State University which operated experiment stations. No link was established between anything done by these institutions and the facts of this case; that grant-in-aid was wholly unconnected with respondent and this lawsuit.

That is the full extent of petitioner's contact with the State of Washington. Respondent says in its brief at page 16:

> "Thus, even if this court were to review jurisdiction based upon the commission of a tortious act within the State of Washington because the fact of damage occurred there, and even if the Court determined that this exceeded constitutional limitations, all that could result would be a referral of the case back to the Supreme Court of the State of Washington for its determination of whether there had been sufficient activities to constitute the transaction of business within the state. From the cited portion of the

opinion it is fairly clear as to what the decision of the Washington Supreme Court would be!"

While we disagree violently with the above prediction as to what the Washington Court might hold, if it is true it is doubly important for this Court to review this case, for no other case, state or federal, has yet sustained "long-arm" jurisdiction based on so few or such tenuous contacts nor has any court, including this one, ever held that conduct by a non-resident corporation, as sporadic and limited as that above described, constituted the transaction of business sufficient to subject it to jurisdiction.

"TORTIOUS ACT" vs. "COMMISSION OF A TORT IN WHOLE OR IN PART"

The Washington Supreme Court upheld state jurisdiction in this case solely on the theory that the place of injury determines the situs of the tort and that since the situs is in Washingon, petitioner's Chicago-to-New York letter (Ex. 119B) constituted "the commission of a tortious act within this state" (R.C.W. 4.28.185(1)(b)). Thus, this case must be distinguished from those "tortious conduct" cases in which the non-resident defendant committed a physical tortious act *within* the forum state. Care must also be taken to distinguish between state "long-arm" statutes. Some, like the Washington and Illinois (Ill. Civ. Prac. Act. §§ 16, 17) statutes require the commission of a tortious act, some physically present conduct, within the forum state. Others, like the West Virginia (W.V.C., Ch. 31, Art. 1, §71) and Minnesota (Minn. Stat. Ann., § 303.13(1)(3)), acts re-

quire only the "commission of a tort, in whole *or in part,*" within the forum state.

At least two federal district court cases, involving both types of "long-arm" language, have denied state jurisdiction where the only contact between the non-resident and the forum state was out-of-state conduct resulting in injury within the forum.

In *Mann v. Equitable Gas Co.*, 209 F. Supp. 571 (N.D. W.Va., 1962) the court was concerned, as was the Washington Supreme Court in this case, *solely* with out-of-state conduct resulting in forum-state injury. The West Virginia statute, however, required only the commission of the tort "in whole *or in part*" within West Virginia, rather than the commission by the non-resident of *a tortious act* within the state. Even under this more liberal "long-arm" statute, the court held there was no jurisdiction, for the reason that this relationship did not provide the minimal contacts required in *International Shoe, supra.*

The non-resident defendant in *Mann* was a Texas corporation (Peerless) which manufactured gas pipe and sold it throughout the United States. It was alleged that this defendant had negligently manufactured some pipe, sold it through its usual channels and that due to a defect in the pipe, the plaintiff was injured by an explosion in West Virginia. The court said:

> "I find that the facts before me, including the allegations of the complaint, do not establish the necessary minimal contacts required for due process, and that

> this Court has not acquired jurisdiction to render a personal judgment against Peerless by such substituted service, for two reasons: First, Peerless did not commit a tort, in whole or in part, in West Virginia; Second, *if under the place of effect theory of choice of law, the negligent manufacture of the segment of pipe in Texas and its use in West Virginia by a purchaser constitutes the commission of a tort in West Virginia by the manufacturer, there would still be lacking the minimal contacts to constitute due process of law.* . . . I am not unmindful that the place of effect theory of choice of law is the majority view as to the law governing torts, but to apply such theory to a statute like this is unsound, and *results in an extraterritorial application of law in derogation of due process.*" 209 F. Supp. at 573-74. (Emphasis added.)

The Court also refused to hold even that the defendant had committed a tort, in whole *or in part*, in West Virginia. It is even clearer that the defendant did *not* commit a tortious *act* in West Virginia.

The *Mann* case is this case, except for the statutory language; and that difference should impose a more difficult burden for the respondent here in obtaining jurisdiction in Washington than confronted the plaintiff in *Mann* in West Virginia. Certainly the writing of a letter from Illinois to New York, whether negligent or not, is not the commission of a tortious *act* in Washington. Even more certainly, any injury resulting in Washington from such a letter cannot alone constitute the minimal contacts necessary to jurisdiction. Yet that is what the Washington Court has held. By ignoring the plain requirement of the Washington statute (and *Hanson*) that the cause of action *arise out of some conduct or transaction in this state* the Washington Court has

exceeded the permissible limits required by the due process clause of the 14th Amendment.

Another case which reaches the same result is *Pendzimas v. Eastern Metal Prod. Corp.*, 218 F. Supp. 524 (D. Minn., 1961). There the Court was dealing with the West Virginia-type statute, and held that the sale in New York by the non-resident defendant *directly to the wholesale distributor* in Minnesota was not a sufficient contact with Minnesota to render defendant amenable to jurisdiction there. Recognizing that the Minnesota Supreme Court would probably have ruled the other way, the District Court said:

> "However, it is difficult, consistent with the teachings of the weight of authority, to find any support for the fiction that, by reason of a single sale of merchandise to a Minnesota wholesaler consummated in another State, a negligent foreign corporation, *without more*, has therefore by a so-called voluntary act, brought this litigation into being in this State and subjected itself to process herein because here the last event took place which would make it liable for its tort." 218 F. Supp. at 527;

and

> "the Court would . . . be making an alarming departure from the reasoning to be found in the great weight of applicable authority [citing cases] in the event the Minnesota statute on this showing were held to be non-violative of the due process clause of the Federal Constitution. *I do not understand that the mere enactment of a State statute expands the concepts of doing business so as to create power in that State over a foreign corporation beyond the standards of jurisdictional due process.*" 218 F. Supp. at 529. (Emphasis added.)

That is precisely the impact of the holding of the Washington Supreme Court in this case, in the face, however, of an even more stringent "long-arm" statute and in the absence of a direct sale, wherever completed, between petitioner and the respondent.

The case upon which respondent seems to rely almost entirely, *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965) seems by its language, if not by its result, to support petitioner. While construing the same Minnesota statute involved in *Pendzimas, supra,* (which is more liberal than the Washington statute), the Court considered several cases, including *Pendizmas,* without criticism, and then found that in the *particular* case before it, there were sufficient contacts to meet the requirements of due process. But the facts of *Aftanase* are far different from those of the present case. There the defendant had a long history of selling and shipping its machinery *directly* to residents in Minnesota, whose orders were obtained through independent Minnesota sales agents; it sold repair parts and sent parts lists and brochures *directly* into Minnesota; the machine causing the injury was *defective* when shipped by defendant; the defendant voluntarily placed these machines *directly* into channels of commerce to Minnesota and knew the exact destination of the machines. These contacts are entirely missing from the case at bar, and were not relied upon by the Washington Court.

Clearly the Washington Supreme Court has exceeded the

permissible bounds of due process in holding that tortious conduct out of state, resulting in forum-state injury, *alone*, is sufficient under the Washington statute to create *in personam jurisdiction* over petitioner.

THE PRESENT CONFLICT IN THE LAW

Beginning with *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.ed 95 (1945), the restrictions on state jurisdiction over non-residents were substantially relaxed. But it is clear, even from *International Shoe* that the relaxation of these restrictions did not constitute their elimination. This Court in *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L.ed 2d 1283 (1958), makes it clear that there are still limitations on the exercise of state jurisdiction over non-residents. There, in recognizing the effect of *International Shoe*, *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 70 S. Ct. 927, 94 L.ed 1154 (1950), *Perkins v. Benquet Consol. Min. Co.*, 342 U.S. 437, 72 S. Ct. 413, 96 L.ed 485 (1952), and *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L.ed 223 (1957), this Court said:

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. *They are a consequence of territorial limitations on the power of the respective States.* However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." 2 L.ed 2d at 1296 (Emphasis added.)

Somewhere between the *International Shoe* "minimal contacts and the *Hanson* pronouncement lies the line which separates situations of permissible state jurisdiction from those situations where such jurisdiction is precluded by the requirements of due process. The location of that line is the subject of a great deal of controversy among the members of the bench and bar in the United States, as evidenced by the conflicting views of the many authors of legal writings on the subject, (see MOORE'S FEDERAL PRACTICE § 4.25(1)-(5)), and even more dramatically by the head-on conflict in the case law.

This case-law conflict is described in the petition, beginning at page 8. Respondent attempts in its brief to suggest that the conflict is only illusory. For instance, respondent contends there is no conflict between *Velandra v. Regie National des Usines Renault*, 336 F.2d 292 (6th Cir. 1964) and *Regie National des Usines Renault v. Superior Court*, 208 Cal. App.2d 702, 25 Cal. Rptr 530 (1964). Yet a reading of these two cases shows clearly that Renault occupied the same relationship with respect to the forum state in each case and that the Court of Appeals in *Velandra* recognized that the facts were analogous in each case. The results in the two cases are opposite, the Sixth Circuit having viewed the law differently than the California Court, and they are in obvious conflict.

This conflict is frequent between the state courts (which tend to uphold the assertion of state jurisdiction over non-

residents) and local federal courts, which, perhaps more sensitive to federal due process implications, tend to deny such jurisdiction. Respondent in its brief (p. 19-20) attempts to show that no real conflict exists between this case, as decided by the Washington Supreme Court, and the related cases involving petitioner decided by the U.S. District Court of the Eastern District of Washington. Respondent says that the federal court's decision is not pertinent "because the motion to quash was ruled upon by the District Court before respondent had completed its discovery and had learned of the scope of petitioner's activities within this state." But as is clear from the District Court's opinion, set forth in full in the petition (pp. 13a-22a), the contacts between petitioner and the State of Washington which *were assumed by the Court* were even broader and more substantial than the respondent was able to prove at the trial of this case, *after its discovery had been completed.*

As a result of the decision of the court below, the opinions of the Washington Supreme Court seem to now be in conflict on this very issue. *Tyee Constr. Co. v. Dulien Steel Prod., Inc.*, 62 Wn.2d 106, 381 P.2d 245 (1963) carefully reviewed the case authority in this field and announced a three-part test for judging the assertion of jurisdiction under the same "long arm" statute here involved:

> "Against the backdrop of these decisions, and within the framework of our statute, it would appear reasonable, however, to conclude that there are three basic factors which *must coincide* if jurisdiction is to be entertained. Such would appear to be: (1) the nonresident

> defendant or foreign corporation must *purposefully* do some act or consummate some transaction *in the forum state;* (2) the cause of action *must arise from, or be connected with,* such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation." 62 Wn.2d at 115-16 (Emphasis added.)

The *Tyee* case involved the performance of a contract, made between Dulien Steel Products, Inc., a Washington corporation, and Belyea (the non-resident) whereby Belyea undertook to find a buyer for some electrical generators, and did sell them to a New York corporation. In the course of this performance, Belyea dealt with Dulien, in Washington, by telephone and mail, and by sending its inspection agents to Washington to oversee the sale and shipping of the generators and to participate in the dismantling of the generators. Clearly, such contacts brought Belyea much closer to the state of Washington than does anything shown in the present case with respect to petitioner. Yet when the Court reviewed the facts it found that, although the defendant had purposefully performed some acts within the state of Washington, that because the action did not arise directly from those acts, the "assumption of in personam jurisdiction over Belyea in this action would offend 'traditional notions of fair play and substantial justice' within the contemplation of the due process clause." 62 Wn.2d at 118.

In making that judgment as to the due process question the Court considered that Belyea's principal place of business was in New Jersey (petitioner's is in Illinois); the transaction which was conducted by Belyea in Washington was an "isolated business excursion" into this state (comparable perhaps to Beaudoin's two "excursions," but more extensive); the transaction involved no systematic or continuing service in Washington by Belyea (there is not even the *allegation* here, let alone proof, that petitioner provided any systematic continuing service); the presence of any agents of Belyea in Washington was *incidental*, rather than *essential*, to the transaction (the presence of petitioner's employee, Howard Beaudoin, was totally unconnected with respondent's cause of action; that presence was not even incidentally connected).

Respondent relies heavily on *Aftanase v. Economy Baler* Co., 343 F.2d 187 (8th Cir. 1965). That decision, however, graphically shows the conflict which exists between the 8th Circuit *(Aftanase)* and the 6th Circuit *(Velandra v. Regie National des Usines Renault, supra)*. In both cases, the defendant manufactured machinery, outside the forum state, which was regularly sold to consumers within the forum state. In each case, the plaintiff was injured by an allegedly defective machine. In *Aftanase* the 8th Circuit upheld the assertion of jurisdiction; in *Velandra* the 6th Circuit refused it. Certainly there were differences in the facts of the two cases as to the contacts of the defendants with the respective States. But these differences were not substantial. Indeed,

upon reading the cases, one gets a distinct impression that the contacts in *Velandra* were somewhat more substantial than those in *Aftanase*, in that, in *Velandra*, Renault dealt through a wholly owned subsidiary physically and legally *resident in the forum state*, while the *Aftanase* defendant merely dealt through independent agents.

The most recent expression of opinion from one member of this Court is the Opinion in Chambers dated July 13, 1965, by Mr. Justice Goldberg in *Rosenblatt v. American Cyanamid Co.*, 381 U.S. ____, 86 S. Ct. 1, 15 L.ed 2d 39 (1965).

In distinguishing the *Rosenblatt* situation from *Hanson v. Denckla*, Justice Goldberg clearly draws a line, which if applied to this case requires the holding that petitioner was not amenable to Washington jurisdiction. In making that distinction, the opinion notes two important differences between *Rosenblatt* and the cases where jurisdiction was denied: (1) "the foreign defendant was never physically present in the forum State," and (2) "the tortious act there was unintentional." 15 L.ed 2d at 43. In the present case, the same distinctions apply. The corporate petitioner was never physically present in the State of Washington. The closest it came to such presence was the two isolated trips by its "missionary man" Howard Beaudoin, *neither of which was related in any manner whatever to the respondent or to the cause of action asserted here by respondent.* Secondly, the alleged tortious act was completely and undeniably unintentional. The only alleged tortious conduct of petitioner

consisted of a letter (Ex. 119B) written by petitioner from Chicago, Illinois, to New York City. This letter was written in answer to Mr. Gimbel's request (Ex. 119A), mailed from New York City to Chicago for information about the use of petitioner's insecticide with respect to residues which might be harmful to *human beings. No other act of negligence is involved.* But respondent's cause of action is for injury to *crops and soil, not* to human beings. Clearly, if the exchange of correspondence cited above resulted in damage to respondent's crops, that damage was at worst unintentional on the part of petitioner and could not conceivably be argued to have occurred in the State of Washington.

The opinion further states with respect to *Hanson v. Denckla* that it:

> "does not cast any doubt upon the validity of jurisdiction obtained by a 'long arm' statute, but on the contrary it clearly *supports* New York's assertion of jurisdiction here. In Hanson the Court observed that 'The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State.' 357 U.S. at 251, 2 L.ed 2d at 1296. What is *essential* in each case, the Court held, is 'that there be some act by which the defendant *purposefully* avails itself of the privilege of conducting activities within the forum State . . .' 357 U.S. at 253, 2 L.ed 2d at 1298. Currie has interpreted and generalized the Hanson test as a requirement 'that the defendant must have taken *voluntary* action *calculated to have an effect in the forum state.*' Currie, op cit. at 549. Clearly appellant's conduct here meets all of these tests." 15 L.ed 2d at 44 (Emphasis added.)

Clearly the present case does *not* meet even one of the above tests. It is a case which should, but in its appellate

history thus far does not, follow the result of *Hanson v. Denckla.*

That there is substantial and troublesome conflict in this area of the law is obvious from the language of the decisions. *Aftanase v. Economy Baler Co., supra,* the case upon which respondent relies in its attempt to show there is no conflict, states:

> "We thus may not be confronted, factually, with a strict 'single-act' situation such as where an isolated offending product is the only contact between the defendant and the forum state. And we thus are not propelled *into the very center of the controversial area* of pure single act interstate situations where courts, on the constitutional issue, appear still *to reach varying results.*" 343 F. 2d at 189, citing many cases, state and federal, from all over the United States. (Emphasis added.)

And further, the *Aftanase* decision says, after reviewing the United States Supreme Court opinions from *International Shoe* to *Hanson v. Denckla:*

> "We also think it is fair to say that these five Supreme Court cases establish only general and not precise guidelines. Perhaps they purposely do no more than this." 343 F. 2d at 197.

In *Pendzimas v. Eastern Metal Prod. Co.,* 218 F. Supp. 524 (D. Minn., 1961) the Court realized it might not be correct in its ruling:

> "The Court is reluctant to depart from the holding of the Minnesota Supreme Court in the Atkins case, but we are confronted here with a Federal question, not a State question, and where the Minnesota Supreme Court assumes to depart with apparent unlimited lati-

tude from the pronounced weight of authority in determining the concepts of minimal contacts of a foreign corporation in a State necessary to sustain jurisdiction, I have concluded to follow the Mueller case *with the hope that this matter may reach the Court of Appeals and ultimately the Supreme Court so that the question finally may be set at rest.*" 218 F. Supp. at 529. (Emphasis added.)

Moore's Federal Practice discusses the conflict and confusion at considerable length and summarizes the situation:

> "If there are substantial contacts with the state, for example a substantial and continuing business, and if the cause of action arises of the business done in the state, jurisdiction will be sustained. If there are substantial contacts with the state, but the cause of action does not arise out of the contacts, jurisdiction may be sustained. If there is a minimum of contacts, and the cause of action arises out of the contacts, it will normally be fair and reasonable to sustain jurisdiction. *If there is a minimum of contacts and the cause of action does not arise out of the contacts,* there will normally be *no basis of jurisdiction,* since it is difficult to establish the factors necessary to meet the fair and reasonable test." 2 MOORE'S FEDERAL PRAC. § 4.25(5), p. 1173. (Emphasis added.)

There is much confusion and conflict in the application by lower courts, state and federal, of the standards set forth in the *International Shoe* and the *Hanson* cases. This Court has the opportunity with this case to clear away much of this confusion and conflict.

CONCLUSION

There is wide disagreement between the several states, between state courts and local U.S. District Courts, and among the 8th and 6th circuits as to the extent of these

territorial restrictions on the jurisdiction of the sovereign states. This case presents the ideal vehicle for resolution at this disagreement. The petitioner's Washington contacts are at an absolute minimum and were unrelated to respondent's cause of action. Further, unlike all other tort cases where jurisdiction was held to have been constitutionally obtained over a non-resident, there is here no defective product involved. Rather, petitioner, acting wholly and entirely without the State of Washington, marketed a product true in all respects to its label, which product found its way to Washington *after manufacturing processes conducted by others not parties to this action.* Petitioner respectfully submits that by accepting this case for decision, this Court will take a much needed step forward in a federal constitutional area presently beset with confusion, disagreement and conflict.

Respectfully submitted,

WILLIAM A. HELSELL,
1610 Washington Building
Seattle, Washington 98101
Attorney for Petitioner.

Of Counsel:
HELSELL, PAUL, FETTERMAN, TODD
& HOKANSON
1610 Washington Building
Seattle, Washington 98101